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IN THE

Supreme Court of the United States

October Term 1977

No. 76-1804

A. E. HOTCHNER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT DOUBLEDAY & COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The petition of A. E. Hotchner (Hotchner) seeks review of a unanimous opinion of the United States Court of Appeals for the Second Circuit (Lombard, Cir. J.) dated March 23, 1977 (551 F. 2d 910; Pet., p. 1a). The opinion reversed a judgment entered on September 1, 1976 following a trial in the United States District Court for the Southern District of New York (Brieant, J.) in which a jury returned a verdict in favor of Hotchner for $1.00 compensatory damages on each of two counts (libel and invasion of privacy) contained in the complaint and $125,000.00 in punitive damages on each count but not both.

Question Presented

Hotchner's petition (pp. 2-3) enumerates four questions, with sub-parts, for review. What is manifest from the tenor of these questions is that the only issue before this Court is whether there was sufficient evidence to sustain the jury verdict according to the strict standards first imposed by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Parenthetically, we note here and *infra* that each of Hotchner's questions is replete with statements and assumptions which, as the record and the Second Circuit opinion substantiate, simply do not reflect what occurred at trial or on appeal.

Since the questions presented by Hotchner are duplicative and confusing, Doubleday restates, pursuant to Rule 40(3) of the Supreme Court Rules, the question presented for review as follows:

> Whether the United States Court of Appeals for the Second Circuit was correct in reversing the jury verdict below since as a matter of law "there was no evidence from which the jury might reasonably have found that Doubleday published the alleged libels with knowledge of falsity or reckless disregard for truth." (551 F. 2d 910, 914; Pet. 9a).[1]

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[1] Doubleday presented numerous other reasons to the Second Circuit to warrant reversal of the jury verdict. Since the Second Circuit's reversal was granted on the threshold question of liability, the other reasons warranting reversal were not reached or discussed by the Second Circuit. These will be discussed briefly at the conclusion of Doubleday's brief herein.

Counter Statement of the Case

The subject of this action is certain statements, identified below, which appear in *Hemingway in Spain* (the "Book") (Exhibit 1, 6a[2]), an English language translation of a work originally published in the Spanish language in Spain in 1967 entitled *Hemingway: entre la vida y la muerte* (the "Spanish work"). (Exhibit 26, 7a) The Spanish work was written by the noted Spanish journalist and author Jose Luis Castillo-Puche ("Castillo-Puche") and published by the important Spanish publisher Ediciones Destino ("Destino"). The Book is a personal reminiscence by Castillo-Puche about the time he spent with Hemingway in Spain and Cuba and his analysis of the relationship which existed between Hemingway and Spain. There are seventeen references in the 388 page Book to Hotchner, who was a traveling companion of Hemingway in Spain. Hotchner's complaint (12a) objected to these references and to two others that did not refer to him. The jury found that Hotchner had been defamed by only six, namely: that Hotchner was: (1) a "toady", (152a), (2) a "hypocrite", (154a), (3) "an exploiter of Hemingway", (156a), (4) that Hemingway said of him "He's a little precious, but he's a very smart cookie" . . . "I don't really trust him though", (157a), (5) that because Hotchner had earned lots of money for Hemingway he "had been motivated by something other than worshipful admiration for a great writer", (164a) and (6) that Hotchner was a "ridiculous" figure who "hung around" Hemingway and exploited the latter's reputation even though he [Hotchner] "may have seriously thought he was looking after [Hemingway's] interests and protecting him" (166a).

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[2] "a" references are to the Appendix in the Court of Appeals; "t" references are to pages from the trial record.

Doubleday, after learning of the Spanish work from a favorable review which appeared in the *Saturday Review* (Exh. P, 245a, 345-464a) and obtaining written opinions and critiques from two independent Hemingway experts (Exhs. Q and R, 246-48a, 347-348a) acquired the English language rights to the Spanish work pursuant to an agreement with Destino dated May 18, 1970 (201a). Doubleday hired Helen Lane, an award-winning translator, to translate (249a) the Spanish work into literary English and published her translation in the United States in 1974 (Exhibit 1, 6a). Only 7,500 copies were printed, of which less than half (3,488 copies) have been sold (195a). Doubleday lost money on the Book.

Hotchner, a well-known writer and lecturer, was held by the district court to be a public figure for purposes of litigation concerning his relationship with Ernest Hemingway. No objection is or has been taken from this ruling. (404 F. Supp. 1041; 110a) It was, in fact, Hotchner's own story of his relationship with Hemingway, *Papa Hemingway*, which first earned him a national reputation. When a public figure sues for libel, the First Amendment bars recovery unless the plaintiff proves that the defamatory statements were made with knowledge of falsity or with reckless disregard for the truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 162-65 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964).

It was clear beyond peradventure, as even Hotchner's counsel and the trial judge recognized, that Hotchner had failed to prove at trial that Doubleday published the statements referring to him with knowledge that they were false. (342a) Consequently, Hotchner's case depended upon proof that Doubleday had published the statements with reckless disregard of whether they were false or not. His

principal evidence in this regard consisted of an inter-office memorandum (Exhibit 9, 214a) from Doubleday's files in which the assistant contracts manager recommended to the editor in charge of the book that certain statements be deleted, modified or toned down. This recommendation was adopted by the editor, who revised the offensive material (Exhibit 5A-5G, 203a-210a) and in the course thereof obtained the approval of the Spanish author to the same (Exhibit 12, 219a), the author stating that while he consented to any revision which Doubleday thought necessary to avoid libel litigation, he nonetheless reaffirmed the truth of the statements made about Hotchner. Hotchner testified, of course, that none of the statements made about him was true. The sum of the testimony of his other witnesses was simply that, although they had no knowledge of the particular circumstances to which the statements referred, it was the opinion of each that, based upon what each knew about the relationship between Hotchner and Hemingway, the author's statements were not accurate. There was other testimony from these witnesses concerning certain innocuous non-defamatory statements unrelated to Hotchner which were claimed to be inaccurate, but there was no testimony that Doubleday either knew or was aware of any such inaccuracy.

Doubleday called witnesses to prove (i) that it had no knowledge of the alleged falsity of the statements and had acted reasonably in revising statements about Hotchner, (ii) that it had learned of the Spanish work from a reputable source and that it had the Spanish work reviewed by two independent Hemingway experts who expressed no doubt about the Book's accuracy, (iii) that the translator of the work was highly regarded, (iv) that persons closest to Hemingway, his wife and secretary, believed that the author's stated opinions about Hotchner were reasonable

and that the statements attributed to Hemingway about Hotchner would not have been out of character for Hemingway to have made, and (v) that Castillo-Puche, the author, was one of Spain's foremost writers and the recipient of prizes for his writing and journalism (590t), and that the Spanish publisher Destino was a reputable and prominent publishing house in Madrid (600t). The trial record establishes not only that there was a failure by Hotchner to prove that Doubleday had published recklessly—not caring whether the statements were true or false—but, moreover, that the testimony of the Doubleday witnesses showed that Doubleday had acted reasonably under the circumstances and entertained no serious doubt as to the truth of the statements made about Hotchner.

REASONS FOR NOT GRANTING CERTIORARI

POINT I

The United States Court of Appeals for the Second Circuit followed the established principles of this Court first enunciated in *New York Times Co.* v. *Sullivan* in holding that as a matter of law Hotchner failed to prove by clear and convincing evidence that Doubleday published the allegedly libelous statements with knowledge of falsity or with reckless disregard for their truth or falsity.

Hotchner's petition, in a contrived and distorted presentation of the law and record, argues for certiorari on the following theory: the Second Circuit reversed his two dollar compensatory damage and $125,000 punitive damage jury verdict, therefore: the Second Circuit tried the case *de novo,* reviewed the evidence in a light most favorable to Doubleday, drew all inferences in favor of Doubleday and, denied Hotchner his constitutional right to a jury trial. This contention ignores the traditional function of an appellate court in reviewing a jury verdict.

Hotchner's attorneys recognize that Supreme Court Rule 19 provides that consideration for review on certiorari will be given when the decision appealed from is in conflict with a decision of another Court of Appeals. Thus, they contend that the Second Circuit opinion in this action is in conflict with *Guam Federation of Teachers Local 1581, A.F.T.* v. *Ysrael,* 492 F.2d 438 (9th Cir. 1974), *cert. denied* 419 U.S. 872 (1974). The alleged conflict which Hotchner seeks to develop between these two opinions is unsupportable. The two cases—although plainly distinguishable on their facts—are just as plainly consistent as to the legal standards which they apply.

In *Guam*, the Ninth Circuit reversed and remanded a directed verdict entered in favor of the defendant on the grounds that the evidence adduced at trial, when viewed in a light most favorable to the plaintiff, was sufficient to require that the issue of liability be submitted to a jury. The court opined that:

> [i]n this case, Ysrael's own testimony as an adverse witness is enough to get the plaintiff to the jury under the *New York Times* standards. He repeatedly admitted that he did not know whether what he said was true.

The fact that Ysrael, the *author* of the alleged libel, testified that he had no reason to suspect that his own statements were true was viewed by the Ninth Circuit as sufficient to support a legitimate inference of reckless disregard. In the *Hotchner* case, the Second Circuit determined that the evidence adduced at trial was *not* sufficient to support a legitimate inference of reckless disregard on the part of the publisher, Doubleday:

> Thus, there was no evidence from which the jury might reasonably have found that the defendant published the alleged libels with knowledge of falsity or reckless disregard for truth. (551 F.2d at 914)

As the court in *Guam, supra,* recognized "when no contrary inference can legitimately be drawn", 492 F.2d 438, 441, a court must render judgment in favor of a moving party or an appellant. That is exactly what the Second Circuit in *Hotchner* did. The decisions of the Ninth Circuit in *Guam* and of the Second Circuit in *Hotchner* are consistent, and cannot be construed by Hotchner to be otherwise.

Thus, the standard of review applied by the Second Circuit in this constitutional libel action was the same as

that enunciated by this Court in *New York Times Co.* v. *Sullivan, supra:*

> '[T]he rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect". [Citations omitted]. We must "make an independent examination of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion into the field of free expression.' 376 U.S. at 285. [Citation omitted].

This rule was restated by Justice Stevens (then Judge Stevens) in *Gertz* v. *Robert Welch, Inc.*, 471 F. 2d 801 at 807 (7th Cir. 1972):

> "[T]he [Supreme] Court has plainly stated that the evidence establishing reckless disregard for the truth must be clear and convincing, and that an appellate court has *an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved.* Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment." (Emphasis added)

Adhering to these directives, the Second Circuit in *Hotchner,* following the standard which it had only some six months before applied in *Buckley* v. *Littell,* 539 F. 2d 882 at 888 (2nd Cir. 1976), *cert. denied,* —— U.S. ——, 45 U.S.L.W. 3489 (U.S. Jan. 17, 1977), reviewed the trial record as follows:

> "To insure that proper weight has been given to the protection of First Amendment rights, it is important

> that the court make 'an independent examination of the whole record' in scrutinizing the jury finding of scienter in a libel case" (551 F.2d at 913; Pet., p. 6a)

We now turn to a discussion of the evidence introduced at trial which supports as a matter of law the Second Circuit's determination that Hotchner constitutionally failed to prove that Doubleday published with reckless disregard for the truth.

The Second Circuit held that the evidence was insufficient to establish that Doubleday "had cause seriously to suspect" that the statements about Hotchner were not true. (551 F. 2d at 914; Pet., p. 8a) In fact, there was *no evidence introduced at trial,* let alone clear and convincing evidence, that Doubleday had reason to suspect the truth of the statements about Hotchner or entertained serious doubts about the truth of the statements concerning Hotchner.

Hotchner called no witnesses who testified as to any doubts expressed by Doubleday. None of his witnesses even claimed that Doubleday should have known that any of the statements about Hotchner were false.

Doubleday, on the other hand, put on the stand Kathryn Medina, the editor who had overall responsibility for the Book; William Austin, the assistant contracts manager who reviewed eight pages (Exhibits 5A-5G, 203a-210a) containing most of the statements about Hotchner; Frank Hoffman, the copy editor who read the Book twice for inconsistencies and errors[3] after certain of the references to Hotchner had been eliminated, toned down or rewritten;

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[3] Although the copy editor's job is not to verify facts independently, to the extent that any of the statements about Hotchner were inconsistent with each other or appeared unlikely in view of the other statements made in the book, Mr. Hoffman would have called them to the editor's attention (369a-371a).

and, by a mutually agreed-to written stipulation, Helen Lane, the independent translator (349a-350a) who prepared the English text for publication from the original Spanish work (196a). Mrs. Medina and Mr. Austin both testified that they had no reason to suspect that any of the statements about Hotchner might be false (360a, 375a). Hotchner's attorney did not raise this subject with either witness on cross-examination. Mrs. Lane, while she was translating, was reading "Carlos Baker's monumental definitive biography of Hemingway" (Exhibits S, U, and Y, 10a, 254a, 10a), the acknowledged authority on the facts of Hemingway's life, and she discovered "a number of misspellings and little errors of detail in Castillo-Puche" (Exhibit 16, 22a). None of the "little errors of detail" concerned Hotchner.[4] Both Mr. Hoffman and Mrs. Lane testified, again without challenge on cross-examination, that the name Hotchner never came up in their discussion with or reports to Mrs. Medina (187a, 371a).

Hotchner, as he has done throughout this litigation, contends that certain Doubleday documents constitute evidence of reckless disregard for the truth by Doubleday. (Pet. pp. 11-14). An examination of these documents reveals that they prove the exact opposite, namely, that Doubleday exercised the care of a reasonable publisher and attempted in good faith to avoid libeling Hotchner.

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[4] In this regard, at footnote 8, page 13, Hotchner quotes from a letter which Mrs. Lane sent to Mrs. Medina. Through the use of ellipses and "emphasis supplied", he attempts to exploit this quote as evidence of reckless disregard and gives words a meaning which they were never intended to have. In fact, the "gross errors of fact", which Hotchner would have this Court believe refer to statements in the Book about him, refer to Castillo-Puche's comments and citations to Hemingway's novels. A reading of the entire letter (Exh. 17, 227a) and Mrs. Medina's testimony confirmed this. It has nothing whatsoever to do with whether Doubleday published the statements about Hotchner with reckless disregard.

The Austin memo (Exhibit 9, 214a) is a compilation by a non-lawyer of certain uncomplimentary statements about Hotchner. Mr. Austin's expression of concern that the statements could not be substantiated refers only to the fact that the statements are either expressions of the author's opinion or a statement of Ernest Hemingway whom Mr. Austin knew to be dead (375a, 379a, 380a). In any event, Mrs. Medina did eliminate and tone down these statements as recommended by Mr. Austin (Exhibits 5A-5G, 1 and 30 (Columns 2 and 3), 203a-210a, 230a). After she advised Castillo-Puche of this (Exhibit 11, 217a), he responded by letter (Exhibit 12, 219a) in which he (1) reaffirmed the truth of his comments about Hotchner, and (2) denied any intent to offend Hotchner:

> "I don't mind that you lighten the words with which I qualify Mr. Hotchner, specially (sic) taking away anything that could be used as a libel suit against me. Nevertheless, I don't want him to appear as a man who was in Ernest's most sincere trust and as a possessor of all his secrets, like he made it look in his books. He was always a servant to Hemingway, who didn't mind much about him. To me he said once that Mr. Hotchner was a man he wouldn't want to be left alone in a room with.
>
> Even so, I have no interest in offendering [sic] Mr. Hotchner. You could then, as you said, send me the pages in which this toning down has taken place and I hope to be able to give my approval immediately." (exhibit 12, 219a).

In fact, Doubleday had good reason to believe in the accuracy of Castillo-Puche's statements. Prior to publication, Doubleday knew that the author was well respected (316a) and that Destino, one of Spain's major publishers, had represented and warranted to Doubleday that the work

was not libelous nor did it invade anyone's privacy (Exhibit 2, 201a). This was especially comforting since the Spanish work was published seven years before Doubleday's Book. Prior to the time it acquired the right to translate, Doubleday was also aware of a favorable book review and had independently obtained two reports from qualified experts[5] which praised the Spanish work. (Exhibits S, Q and R, 246a-248a)

Moreover, Doubleday, prior to publication, had tangible evidence of the close relationship which existed between Castillo-Puche and Hemingway. This evidence included, *inter alia,* reproductions of photographs of *them* at a private swimming party (Exhibit E, 9a); at Hemingway's residence (Exhibit H, 10a); in Castillo-Puche's Madrid office (Exhibit M, 10a); and in other places together (Exhibit 26, 7a, Exhibits A, C, D, F, 9a), as well as a reproduction of correspondence from Hemingway to Castillo-Puche (Exhibit N, 10a). In addition, Doubleday had knowledge that they had travelled together to the bedside of the famous Spanish novelist, Don Pio Baroja (Exhibit G, 9a), and that Hemingway had chosen Castillo-Puche to administer the Hemingway Prize for Spanish literature (Exhibit N, 10a).

Parenthetically, we note that Hotchner's petition claims that the Second Circuit relied on evidence that was not known to Doubleday at the time of publication (Pet., pp. 7, 17 and 19). He points to the testimony of Sister de Mola (590t et seq.) and Jose Carrascal (600t et seq.) whom Doubleday had not spoken to until after publication of the Book. Of course, this argument completely misses the

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[5] Ironically, one of these reports (Exhibit Q, 245a) specifically preferred the Book to Hotchner's *Papa Hemingway*, stating:

> "Castillo-Puche's reminiscences * * * have a sort of noble honesty clearly missing in Hotchner." (Exhibit Q, 246a)

point. These witnesses testified concerning the excellent reputation enjoyed by both the Spanish author and publisher prior to the publication of the Book (e.g., 591-592t). Doubleday had knowledge of these reputations prior to publication from various sources, including the *Saturday Review,* the two written reports from the independent Hemingway experts, and a bibliography furnished by Castillo-Puche; Mrs. Medina so testified. (345-50a; 361a; Exhibit X) These witnesses were called to confirm that the Spanish author and publisher enjoyed these excellent reputations prior to Doubleday's publication of the Book. The fact that Doubleday did not obtain this information originally from Sister de Mola or Mr. Carrascal is fundamentally irrelevant. Indeed, if Hotchner's contrived argument were accepted, evidence of reputation would rarely be admissible at trial.

The actions of the Doubleday staff to which we have already referred (*supra,* pp. 10-12) not only negate the claim of serious doubts, but affirmatively manifest careful regard for the propriety of the statements about Hotchner. Thus, Mrs. Medina, recognizing that some of the statements were not complimentary (Exhibit 6, 211a), asked the contracts department of Doubleday to approve them before publication (355a). The contracts department, to which any such problems are referred as a matter of Doubleday policy (372a, 374a), recommended that eleven separate statements should be toned down or eliminated (374a) and Mr. Austin wrote his memorandum to Mrs. Medina suggesting revisions. (Exhibit 9, 214a) Most significant are the eight pages reviewed by Mr. Austin (Exhibit 5A-G, 203a-210a) which, when compared with the substituted language of the Book (Exhibit 1, 6a), show that substantial changes were made by Mrs. Medina, about which Mrs. Medina testified in some detail (355a-359a). Five of the statements mentioned in the Austin memoran-

dum, including one entire quotation of Hemingway, were deleted; three were toned down; one, as found by the jury, was not defamatory and only two others—"two-faced behavior" and "exploiter of his reputation" were left in the Book. Rather than showing reckless disregard for the truth, these actions are clear evidence of a lively concern for Mr. Hotchner.

Mrs. Medina was unequivocal in her belief that toning down the statements about Hotchner had cured any potential injury to his reputation. (Exhibits 11, 13, 216a, 221a). In writing to Castillo-Puche to inform him of the toning down, she stated that the changes concerning Hotchner would eliminate "the risk [of] a libel suit [by Hotchner], or even a lot of unpleasantness in the American press". (Exhibit 11, 216a). Castillo-Puche's response (Exhibit 12) was a reaffirmation of the truth of all his statements about Hotchner and a denial of any intent to offend Hotchner.

The fact that Doubleday believed that it had eliminated all possible libel of Hotchner, and that Castillo-Puche had confirmed the truth of his statements about Hotchner, is significant. The inquiry with respect to the *New York Times* standard "refers to the defendant's attitude towards the truth or falsity of the material published" (*Carson* v. *Allied News Co.*, 529 F. 2d 206 a 214 (7th Cir. 1976); Pet., p. 13). The test is one which equates "reckless disregard of the truth with subjective awareness of probable falsity" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 334-5, n.6 (1974)).[6]

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[6] Since *Gertz* v. *Robert Welch, Inc.*, *supra*, at 348, requires that the defamatory statement must make "substantial danger to reputation apparent", the toning down did not make danger to reputation apparent to Doubleday. The statements are not actionable for this reason alone.

With respect to subjective awareness of probable falsity, Hotchner's reliance (Pet., p. 13) on the Second Circuit's opinion in *Buckley* v. *Littell*, 539 F. 2d 882 at 896 (2nd Cir. 1976) attempts to distort the import and effect of a publisher's concern for a particular statement. In *Buckley*, the Second Circuit states that the publisher's concern should have been a "red flag" to Littell. It should, of course, have been a red flag to Littell because Littell was *the author* and not the publisher. He, unlike the publisher, should have known whether his statement was true or not. In this case *the publisher* (Doubleday) itself insisted upon eleven significant changes in the manuscript, and obtained a confirmation of truth *from the author* with respect to all of the statements about Hotchner. Cf. *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 178 N.Y.L.J. No. 16, p. 1 *et seq.* (July 25, 1977) (N.Y. Ct. Appeals: 1977).

Hotchner's petition goes on at length (Pet., pp. 22-23) arguing that the statements about Hotchner were not "hot news". Doubleday has never contended that the statements were hot news, nor is the point relevant. Any meaningful inquiry must concentrate on Doubleday's attitude toward the truth or falsity of the statements. If there was no reason to suspect the truth, the inquiry ends. Doubleday never entertained any serious doubts about the Book's veracity. In this regard, however, Hotchner contends (Pet., p. 23) that Doubleday's investigatory failure is proven since no Doubleday employee read *Papa Hemingway* and because Doubleday did not check with the witnesses called by him at trial. As an initial matter, it would be prohibitive and "chilling" to require a publisher to read the substantively related works of every minor character (like Hotchner) whose name incidently appeared in one of its books. In addition, as was previously mentioned, Doubleday independently obtained two reports from qualified Hemingway

experts prior to obtaining rights to the Book. One report specifically preferred the Book's "noble honesty" to Hotchner's *Papa Hemingway* so it is obvious that prior to publication an expert retained by Doubleday was familiar with Hotchner's book. (Exhibit Q, 246a). Moreover, both Mrs. Medina (in editing) and Mrs. Lane (in translating) consulted Carlos Baker's definitive Hemingway biography.[7] (Exhibit 8, 213a, Exhibit 16, 226a)

As far as witnesses are concerned, in opposition to Doubleday's summary judgment motion, Hotchner contended that Doubleday should have confirmed the Spanish author's account not with the people Hotchner called as witnesses, but "with Hemingway's widow." (115a). Yet Mrs. Hemingway, called by Doubleday at trial, testified that when she read the Book she did not consider the statements about Hotchner to be unfair or inaccurate (388a-390a). Asked to direct her attention to each of the Book's references to Hotchner, she further testified that she "considered them true enough and accurate" (389a).

The documentary evidence on which Hotchner relies simply does not constitute evidence that Doubleday "entertained serious doubts" as to the truth or falsity of the statements about Hotchner. The Second Circuit recognized this. In fact, in light of Doubleday's removal, or toning down, of the eleven passages about Hotchner and its receipt of the Spanish author's confirmation of the truth of the original statements, quite the opposite was proved.

Hotchner's second line of proof of reckless disregard sought to show that Doubleday should have known that the Spanish author had feelings of *ill will* towards Hotchner. In fact, in an attempt to disguise the utter repetitive-

[7] In this regard, five out of the twelve references to Hotchner contained in Carlos Baker's index relate to Hotchner's exploitation of Hemingway (67a, 69a, 70a, 73a and 74a).

ness of this argument, Hotchner's petition utilizes constantly changing synonyms in an attempt to make this point (e.g., animus, hatred, etc.).

There is no legal precedent for allowing a finding of reckless disregard of the truth against a publisher solely on evidence of its knowledge of an author's ill will. Cases have held that a jury may consider an author's motive and ill will in finding reckless disregard, *but always as to the person who had such motive or ill will.* Proof of ill will alone as to anyone, much less to attribute it in this case to the publisher, is insufficient to support a finding of reckless disregard. As Judge Stevens stated for the Seventh Circuit in *Gertz:*

> "One distinction which is lost in some of plaintiff's arguments should be kept in mind. . . . '[I]ll will toward plaintiff or bad motives, are not elements of the New York Times standard'. Rosenbloom v. Metromedia, 403 U.S. 29, 52 n. 18, 91 S.Ct. 1811, 1824, 29 L.Ed. 2d 296 (opinion of Mr. Justice Brennan). Thus, the kind of malice which will, for example, defeat a conditional privilege in the traditional tort law of libel, will not satisfy the New York Times standard. However bad its motives, a publisher is protected by the First Amendment as long as the allegedly libelous statements were not made with knowledge of falsity or with reckless disregard of whether they were true or false." (471 F. 2d at 807 n. 13).

As we have already demonstrated, the standard of reckless disregard turns on the defendant's attitude toward the truth or falsity of the statements, and not on the defendant's animosity toward the person defamed. (See e.g., *Gertz* v. *Robert Welch, Inc., supra; St. Amant* v. *Thompson,* 390 U.S. 727 (1968); *Carson* v. *Allied News Co., supra,* at

209, 214). Of course, Hotchner's ill will argument is one further step removed from this standard. According to Hotchner, it is not Doubleday's ill will that is at issue (even the trial judge recognized that Doubleday endeavored to avoid injuring Hotchner (406a)), but Doubleday's alleged knowledge of Castillo-Puche's ill will. Hotchner has not and cannot introduce one iota of authority—from any year or jurisdiction—which suggests that a publisher's awareness of an author's low regard for his subject is evidence, let alone a sufficient basis, to support a finding of the publisher's reckless disregard for the truth.

In this regard, Hotchner has argued that his case should be measured against the ill will present in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) and *Goldwater* v. *Ginzburg,* 414 F. 2d 324 (2nd Cir. 1967). (Pet., pp. 22-23). In *Butts,* as this Court noted, plaintiff Wally Butts was ruined. *Goldwater* involved a notorious and long standing feud characterized by personal animosity and an attempt to ruin a career. In both cases the publishers participated actively in the attack. Conversely, Doubleday tried to protect Hotchner, only an incidental character, by toning down statements about him. Of course, the "violence and vituperativeness" of the libel published in *Goldwater* and the impact of the libel upon the plaintiff in *Butts* are plainly different than the "toned down" statements found by the jury to libel Hotchner, and to result in actual damages to him of one dollar.

Even if it could be said that Doubleday did have knowledge of the author's alleged ill will toward Hotchner, armed with this knowledge, Doubleday acted cautiously in writing to Castillo-Puche who responded and confirmed the truth of the original statements, but agreed to a toning down because, in his words, he had "no interest in offendering [sic] Mr. Hotchner" (Exhibit 12, 219a). Doubleday then toned

down the statements about Hotchner, sent the revised manuscript pages to the author for his review and approval and, prior to publication, had the revised manuscript read twice by the copy editor.

The only evidence other than the statements about Hotchner which was introduced with respect to Doubleday's alleged knowledge of ill will was the prejudicial Purczinski translation. The Purczinski translation was offered to prove that the words in the original Spanish Work as read by Doubleday's agent Lane put Doubleday on notice of the hatred of Castillo-Puche towards Hotchner (Pet., pp. 14-15). In spite of this fact, we *know* how Mrs. Lane translated the statements which the jury found to be libelous, since these statements are all contained on the manuscript pages which Mrs. Medina submitted to Doubleday's Contract's Department for review.[8] (Exhibits 5a-5g, 203a-210a) Furthermore, it defies logic to assume that which is essential to Hotchner's contention, that Mrs. Lane would translate the Spanish in exactly or approximately the same manner as Purczinski. For example, from the Spanish "vagabundo" Purczinski translated, not Mrs. Lane's "ringmaster", but an assertion that Hotchner looked "like one of the leaders of the New York or Chicago gangs"[9] (Ex-

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[8] Moreover, even if Mrs. Lane had initially translated the Book in a manner similar to Purczinski, it would have been outside the scope of her duties, as translator into literary English, to report more offensive language to Doubleday.(196-192a; 349a-350a) Thus, Hotchner's reliance on *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920) (Pet., pp. 15, 25) is misplaced. Indeed, that case supports Doubleday since in *Corrigan* the agent (Mrs. Lane was an independent contractor) was intimately involved with the writing and preparation of the published material. In fact, the book was dedicated to the agent as "the Second Father of this Book." (Id. at 71)

[9] Interestingly, Carlos Baker in his definitive work on Hemingway, says that Hemingway joked with Hotchner "about his freckled face and gangster slouch" (68a).

hibit 30, 233a). The obvious question raised by Purczinski's translation is why he did not select Detroit, or Madrid, or Paris, or even Poughkeepsie? The answer may be found in the fact that the Professor was not qualified to translate, or to testify as an expert. At trial it was established that, unlike Mrs. Lane, Purczinski had never translated a book from Spanish to English, been employed as a literary translator by a publisher, or lived in Spain. He had only infrequently visited it, and he had no personal knowledge of the colloquial terms used by Castillo-Puche (which Purczinski had translated with the help of unnamed third persons and dictionaries). He admitted that, even among qualified experts, there is room for disagreement as to the English equivalent of colloquial Spanish, and he testified that he translates accurately until he comes to uncomplimentary passages about living persons, which he declines to translate. (262-268a)

Hotchner's argument—that Mrs. Lane did, or should have, translated the portions of the Book describing Hotchner as Purczinski did, and should therefore have made comments to Doubleday about those passages—is further blunted by the fact that prior to translation two qualified experts commissioned by Doubleday to review the Spanish edition likewise found no cause for comment. Thus, other than the fact that the Lane translation was uncomplimentary, there is no evidence in the record of Doubleday's alleged knowledge of Castillo-Puche's ill will toward Hotchner.

Hotchner's contention notwithstanding (Pet., pp. 23-29), the Second Circuit did not reverse the jury verdict on the grounds that the statements about Hotchner were automatically protected as "opinion". Clearly it reversed on the grounds that the evidence was insufficient as a matter of law to support a conclusion that Doubleday published

any statements about Hotchner with reckless disregard for the truth. Thus, the Second Circuit held that the statements of opinion about Hotchner were not actionable against Doubleday since Doubleday had no "knowledge of the falsity or probable falsity of the underlying facts" upon which these statements were based. (551 F.2d at 913; Pet., p. 7a)

We have previously examined in general terms the failure of Hotchner's proof and the reasons why Doubleday had no cause to seriously doubt the truth of the statements about Hotchner. We will now consider individually each of the six statements (passage references are to the Special Verdict (151a)) which the jury found to be libelous or invasive of Hotchner's privacy:

> Passage 2. "It was Ordonez, as I remember, who first called him 'Freckles', and the nickname stuck. He pretended not to mind and was good-natured about everything, but he was such a toady at times that it was sickening." (Emphasis added) (152a)

The substantial truth of the greater part of this passage —that Hotchner's nickname was "freckles" and that it was Ordonez who first called him that—was agreed to by all witnesses including Hotchner. Hemingway mentioned it himself in "The Dangerous Summer", a series of articles published in Life Magazine (Exhibit 29c, p. 78). The remainder of the sentence is clearly Castillo-Puche's opinion. Mary Hemingway testified on cross examination that she considered Hotchner a toady (532t) and Valerie Hemingway said that many people deferred to, therefore were "toadies" to, Ernest Hemingway (418t). The remainder of his comments in the Book bear out that the statements were Castillo-Puche's honest reaction to, and opinion of, Hotchner. Moreover, Castillo-Puche described Hotchner's

manner toward Hemingway and concluded that it was obsequious (Exhibit 1, page 82). He also stated that Hotchner was "very careful to be properly attentive to Mary and extremely polite to her and the other guests, but he kept his eye on Ernesto every minute, watching his every move and listening to his every word, especially when he was approached by journalists or photographers" (Exhibit 1, page 196). Surely these facts which Hotchner never denied and which the jury did not find libelous permitted the author to conclude that Hotchner was a toady.

> Passage 4. "The thing I disliked most about Hotchner was his two-faced behavior toward people who were Ernesto's real friends, people such as Juanito Quintana and even Ordonez. Though he was very clever at hiding his true feelings, you could tell that Hotchner was really a hypocrite. But he put up a very good front as Ernesto's mild-mannered, obedient servant." (Emphasis added) (154a).

At trial Hotchner admitted that he was annoyed at Quintana for failing to secure bullfight tickets and lodging for the Hemingway entourage. According to Hotchner, Quintana squandered the money Hemingway gave him for the tickets and lodging (166t). Castillo-Puche undeniably had the opportunity to observe the way Hotchner acted toward Hemingway's Spanish friends when Hotchner was in Hemingway's presence, and when he was not. By observing Hotchner's actions and mannerisms toward Hemingway's Spanish friends, he formed the opinion that Hotchner was "two-faced" or was a "hypocrite". No evidence was introduced at trial to the effect that Castillo-Puche did not observe these relationships or that he did not believe in his honest opinion that Hotchner was a hypocrite. That he had the opportunity to make these observations is substantiated by the testimony of Mary (384a-

385a) and Valerie (382a-383a) Hemingway and Annie Davis (288t-289t, 291t-292t, 328a-329a).

Passage 6. "Hotchner did his best all summer long to make the imaginary duel between Ordonez and Dominguin a real one; in moments when Ernesto was tense or had no one around for company, he was half convinced he was witnessing a genuine 'civil war' in the bullfight world, though I for my part thought the whole affair was a big laugh, and almost everyone else did too.

As an expert at grinding out publicity in the United States, Hotchner knew what a big splash Ernesto's articles were going to make, and was already bragging about what a coup they would be.

I felt very bad about those Life articles, called The Dangerous Summer, to tell the truth, because it seemed to me that the whole farce was beneath Ernesto and that he should have refused to have anything to do with it.

'Freckles' was never open and aboveboard. His mild manner and his air of shy deference seemed to me quite a cover-up for his exploitation of Ernesto." (156a)

Passage 14. " 'Freckles' was in complete control of the situation, and I wasn't at all surprised that he had earned lots of money for Ernesto by signing him up with the television networks and mass-circulation American magazines, though I was quite certain Hotchner had been motivated by something other than worshipful admiration for a great writer." (164a)

Passage 16. "Only a woman like Mary could have put up with those two ridiculous figures who hung around Ernesto every minute: Davis the jealous watchdog of his fame and fortune and Hotchner the exploiter of his reputation. Only Mary knew that Er-

nesto's real riches were intangible, and therefore she allowed him and Davis and Hotchner to do as they pleased. *It is possible that his two American friends may have sincerely thought they were looking after his interests and protecting him.*" [10] (166a)

The facts upon which each of these passages is based were admitted in the Stipulation of Uncontroverted Facts (191a) and in the testimony of Alfred Rice (475t-487t), Hotchner's former attorney and agent who served in the same capacity for Hemingway. The Life Magazine articles entitled "The Dangerous Summer" (Exhibits 29a, 29b, 29c, 8a) confirm the duel between Ordonez and Dominguin and the publicity that it generated. By 1959, Hotchner had admittedly earned huge sums from adapting Hemingway works. In addition to the knowledge and personal observations of Castillo-Puche in 1959, by the time Castillo-Puche wrote his book in 1967 Hotchner had earned close to a million dollars in projects involving the name of Ernest Hemingway. When it is admitted that Hotchner earned almost a million dollars writing about or adapting Hemingway works, the statements calling Hotchner an "exploiter" of Hemingway's reputation (passages 6 and 16) or indicating that "Hotchner had been motivated by something other than worshipful admiration for a great writer" [11] (passage 14), are, at the very least, not unreasonable expressions of opinion.

In short, the record demonstrates that the statements were opinions based upon admitted or substantiated facts

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[10] The last sentence in this passage (emphasized), irrespective of all other considerations, should have precluded a finding that the passage defames Hotchner.

[11] The finding by the jury that this passage is libelous is clearly inconsistent with its earlier finding that Passage 11 (161a)—"he's [Hotchner] out for number one"—is not.

and the personal observations of Castillo-Puche. As a matter of law, therefore, they could not have been published by Doubleday with knowledge of falsity or reckless disregard for the truth, and thus are not actionable.

The sixth passage (Passage 7 from The Special Verdict), is a quotation of a conversation between Hemingway and Castillo-Puche:

> 7. "Then he dropped the subject of Davis and started in on Hotchner: 'He's a little precious, but he's a very smart cookie.'
>
> 'I can see that he's very fond of you,' I replied.
>
> Then, a little while later, he'd whispered, *'I don't really trust him, though'.*" (Emphasis added) (157a).

The last emphasized sentence is a remark attributed to Hemingway about Hotchner. It was established that neither Hotchner nor any one of his trial witnesses was ever a party to or heard any conversation between Hemingway and Castillo-Puche, and Hotchner himself admitted that he did not speak or understand Spanish. Doubleday, on the other hand, called witnesses who spoke and understood Spanish and who testified that Hemingway and Castillo-Puche were friends and conversed in Spanish. And it was their testimony that it was more likely than not that Hemingway would have made this statement about Hotchner.[12]

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[12] Hotchner's petition (p. 19) argues the Second Circuit was in error in holding that the language used in this passage was characteristic of Hemingway (p. 19). He cites his own testimony that Hemingway's language was always "one of politeness" and the testimony of his widow, that she never heard him be coarse or crude. Yet in *Papa Hemingway*, Hemingway is quoted by *Hotchner* as saying "shove them up his ass" (p. 240), "Black-Ass" (p. 118), "goddamn" (pp. 108, 115, 275, 294), "bastards" (p. 119) and "son-of-a-bitch" (pp. 108, 115, 275, 294). In one sequence when asked to suggest a new title for a film, Hotchner quotes Hemingas saying:

However, irrespective of the likelihood of Hemingway having made the statement or one similar to it, the record of its publication precludes a finding that it was published with reckless disregard for the truth. Initially this statement appeared in the manuscript (the Lane translation) in a much more derogatory form as follows:

> "Yes, that's true, but he's [Hotchner] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." (Exhibits 5d and 30, 206a, 231a).

When Mrs. Medina revised this, she eliminated the dubious sexual characterization so that the sentence read "I don't really trust him, though". Moreover, when she sent the revisions to Castillo-Puche, he wrote back, long before he knew this statement would be the basis of a libel action, and reconfirmed that:

> "Ernest did not always talk highly of him [Hotchner]. To me he said once that Mr. Hotchner was a man that he wouldn't want to be left alone in a room with." (Emphasis added) (219a, Exhibit 1).

In short, before this statement was published, Doubleday substantiated the specific remark with the only person who heard it. He confirmed both the idea expressed and the more offensive language used by Hemingway. Yet, Doubleday did not return to the more derogatory version, but published the idea in the least offensive manner. There-

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"Well then, here it is: F as in Fox, U as in Universal, C as in Culver City and K as in R.K.O." (p. 109).

At trial, Hemingway's daughter-in-law Valerie testified that rather than use words like "make-out", Hemingway would have used a word beginning with "f" (466-467t). A third source, Carlos Baker, quotes Ernest say saying "how shitty" (65a) and "shit-maru" (69a).

fore, as a matter of law, the record with respect to the publication of Passage 7 precludes a finding that it was published by Doubleday with reckless disregard.

Finally, Hotchner's petition (pp. 24-25) argues that the statements about Hotchner do not concern matters of public interest. However, it has been held that Hotchner is a public figure at least with respect to his relationship with Hemingway, a ruling which he himself has never objected to. Further, inasmuch as Hotchner claims to be Hemingway's Boswell, his relationship to Hemingway is clearly a matter of public interest and concern.

In determining the existence of "reckless disregard", this Court has held that failure to check the accuracy of the information published with material that happens to be in the defendant's possession (*New York Times Co.* v. *Sullivan,* supra); lack of ordinary care in making charges against a plaintiff (*Garrison* v. *Louisiana,* 379 U.S. 64 (1964); mere negligence (*New York Times Co.* v. *Sullivan*); and failure to substantiate information supplied by an unverified informer (*Monitor Patriot Co.* v. *Roy,* 401 U.S. 265 (1971)) are not sufficient to sustain a plaintiff's verdict. Based on the foregoing authority, there was no basis for a finding in this case that Doubleday published statements about Hotchner with reckless disregard for the truth. There was no evidence that Doubleday had any doubts, let alone serious ones, concerning the truth of the statements about Hotchner. Moreover, there was no contradictory evidence in Doubleday's files, nor was any known to its employees. Doubleday followed its normal and established procedure in publishing the Book, relying on the reputable opinions, reviews and warranties discussed in detail, *supra,* pp. 12-13. If the evidence that was presented in this case is deemed to be sufficient to prove reckless disregard, an impermissibly loose definition of reckless disregard would be established which would under-

mine the tough constitutional standards mandated by this Court in its recent decisions.

In conclusion, the Second Circuit broke no new ground in this action; it merely followed the mandate of this Court in reviewing the constitutional sufficiency of the evidence in this public figure libel action. At the very least the evidence in this action indicated that the statements which the jury found to be libelous were not made by Doubleday with a high degree of awareness of probable falsity or serious doubts or under any other circumstances which permit a plaintiff to recover according to the "actual malice" standards espoused by this Court. Therefore, as a matter of law, the statements about Hotchner were not made with actual malice and the Second Circuit was correct in reversing the judgment below and mandating a judgment in favor of Doubleday dismissing Hotchner's complaint.

POINT II

Various other reasons not reached by the Second Circuit also mandated that the jury verdict be vacated.

Since the Second Circuit determined that the evidence was constitutionally insufficient to support a finding of publication with "actual malice", it was not necessary for the court to consider the numerous other reasons, which were fully briefed, that also compelled that the jury verdict in this action be vacated. These will not be discussed herein at length.

Briefly, (1) prejudicial error was committed throughout the course of the trial; (2) the invasion of privacy claim should have been dismissed as a matter of law since it was legally insufficient pursuant to New York Civil Rights Section 51; (3) it was conceded that there was no proof that Doubleday published with knowledge of falsity and

there was no proof that Doubleday was motivated by ill will or any other consciously motivated reprehensible conduct[13] and therefore the proof was insufficient to permit an award of punitive damages either under constitutional standards or under substantive New York law and (4) in any event, the amount of punitive damages, $125,000.00, was outrageously excessive.

Doubleday respectfully requests the right to brief these matters should this Court grant Hotchner certiorari.

CONCLUSION

By reason of the foregoing Hotchner's petition for a writ of certiorari should be denied.

New York, New York
July 26, 1977

Respectfully submitted,

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[13] With respect to the total lack of evidence of common law malice, Hotchner has continuously attempted to distort Mrs. Medina's words: "to get at Hotchner" (Exhibit 11, 217a; Pet., p. 16). Even the trial court recognized that these words had a meaning exactly opposite to that which Hotchner has attributed to them. Thus, with respect to Hotchner's contention that these words evidenced a heedless disregard for the rights of Hotchner, the trial court stated: "quite the contrary" was true as Doubleday "was anxious not to . . . get at Hotchner" (406a). It was this recognition by the trial judge of absolutely no evidence of common law malice on the part of Doubleday which made the submission of the punitive damage issue to the jury so inconsistent and contradictory.